

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Dave Mitchell	)	File Number EB-04-NY-030
	)	
WPEH807	)	NAL/Acct No. 200432380015
Brooklyn, New York	)	
	)	FRN 0006524631
	)	
	)	

**FORFEITURE ORDER**

**Adopted:** January 18, 2005

**Released:** January 21, 2005

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of four thousand dollars (\$4,000), to Dave Mitchell, (“*Mitchell*”), licensee of station WPEH807, for a business operating as Community Car Service Corp. (“*Community*”), for willful and repeated violation of Section 1.903(a) of the Commission’s Rules (“*Rules*”).<sup>1</sup> The noted violation involves Mitchell’s operation of a base station transmitter and mobile units on an unauthorized frequency.

2. On June 28, 2004, the District Director of the Commission’s New York Field Office (“*New York Office*”) released a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) proposing a forfeiture in the amount of four thousand dollars (\$4,000) to Mitchell for the noted violation.<sup>2</sup> Mitchell filed a response to the *NAL* on July 19, 2004.<sup>3</sup>

**II. BACKGROUND**

3. On February 13, 2004, a Commission agent, using a mobile direction-finding vehicle, monitored the frequency 151.790 MHz in Bronx, New York to follow up on a previous investigation concerning operation on unauthorized frequencies in the Private Land Mobile Radio Service. The agent determined that Mitchell, located at 3429 Eastchester Road, Bronx, New York, operated a base transmitter and mobile units on the frequency 151.790 MHz. Based on a review of Commission databases, the agent determined that neither Mitchell nor Community had a Commission authorization to operate a base station and mobile units on 151.790 MHz in Bronx, New York. Rather, Mitchell was authorized to operate a base station and transmitter units on 151.805 MHz. On February 17, 2004, the New York Office sent Mitchell a Warning Letter via First Class Mail and Certified Mail, Return Receipt

<sup>1</sup>47 C.F.R. § 1.903.

<sup>2</sup>*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432380015 (Enf. Bur., New York Office, released June 28, 2004).

<sup>3</sup>We note that the response was signed “Sadie Colon for Dave Mitchell.” According to the response, Mitchell is ill and Sadie Colon is acting on his behalf.

Requested, for unlicensed operation on the frequency 151.790 MHz. The New York Office received a reply to the Warning Letter on February 25, 2004, in which Mitchell acknowledged the unauthorized operation on 151.790 MHz and indicated his plan to change the frequency to 151.805 MHz the week of February 23, 2004. The agents conducted a follow-up investigation on March 1, 2004, and determined that Mitchell continued to operate on 151.790 MHz without a license in Bronx, New York.

4. In response to the *NAL*, Mitchell states that he now operates the base transmitter and mobile units on 151.805 MHz. As a result, Mitchell claims that the only violation committed was the failure to begin operating on an authorized frequency in a timely manner and therefore operation on the frequency 151.790 MHz should not be considered “willful and illegal.” Mitchell states that he completed the change to the new frequency on March 1, 2004, the date on which the Commission agent conducted the follow-up investigation. In support of this statement, Mitchell submits a letter from Tecno Radio Communications, Inc. (“Tecno Radio”), Mitchell’s new radio vendor, stating that it completed the change from frequency 151.790 MHz to 151.805 MHz on March 1, 2004. Finally, Mitchell requests a payment plan in the event that the forfeiture amount is not reduced or cancelled.

### III. DISCUSSION

5. The forfeiture amount in this case was proposed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>4</sup> Section 1.80 of the Rules,<sup>5</sup> and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Policy Statement*”). In examining Mitchell’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.<sup>6</sup>

6. Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services be used and operated only with a valid authorization granted by the Commission. On two occasions, an FCC agent determined that Mitchell operated a base transmitter and mobile units on 151.790 MHz. A review of Commission records showed no evidence that Mitchell or Community had a Commission authorization to operate a base transmitter and mobile units on 151.790 MHz.

7. Mitchell claims that the only violation committed was his failure to timely change to an authorized frequency and that his actions therefore were not “willful and illegal.” We disagree. For a violation to be willful, it must be committed consciously and deliberately, irrespective of any intent to violate the Rules.<sup>7</sup> An FCC agent determined on two occasions that Mitchell operated on an unauthorized frequency and Mitchell does not dispute this fact. Even after Mitchell received the Warning Letter, he continued to operate on 151.790 MHz without a valid Commission authorization until March 1, 2004, the day his equipment was converted to the authorized frequency. He did so notwithstanding the statement in the Warning Letter that “[o]peration of the unlicensed transmitter must cease immediately.”<sup>8</sup> Although Mitchell states that he took immediate steps to modify the equipment to the authorized frequency, Mitchell admits that he did not do so until after he received the Warning Letter from the Commission. Remedial actions taken after the Commission’s inspection, notice or action have not been considered a

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<sup>4</sup>47 U.S.C. § 503(b).

<sup>5</sup>47 C.F.R. § 1.80.

<sup>6</sup>47 U.S.C. § 503(b)(2)(D).

<sup>7</sup>See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>8</sup>We note that, because the violation at issue here is repeated, we need not even show willful. See Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) (violator liable for forfeiture if violation is willful or repeated).

mitigating factor warranting a reduction of a forfeiture.<sup>9</sup>

8. We have examined Mitchell's response to the *NAL* pursuant to the statutory factors above and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Mitchell willfully<sup>10</sup> and repeatedly<sup>11</sup> violated Section 1.903(a) of the Rules. We find no basis for cancellation or reduction of the \$4,000 forfeiture proposed for this violation. If Mitchell still wishes to request an installment plan, such request should be submitted to the address set forth in paragraph 10 below.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>12</sup> Dave Mitchell **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for willful and repeated violation of Section 1.903(a) of the Rules.

10. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules<sup>13</sup> within thirty (30) days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>14</sup> Payment may be made by credit card through the Commission's Credit and Debt Management Center at (202) 418-1995 or by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission," to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) and the NAL/Acct. No. referenced in the caption. Payment by overnight mail may be sent to BankOne/LB73482, 525 West Monroe, 8<sup>th</sup> Floor Mailroom, Chicago, Illinois 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. The payment must include the FCC Registration Number (FRN) and the NAL/Acct. No. referenced in the caption. Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554.<sup>15</sup>

11. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Dave Mitchell, 3429 Eastchester Road, Bronx, New York 10469.

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<sup>9</sup>See *Forest Electric Corporation*, DA 04-3345, 2004 WL 2403744 ¶ 8 (Enf. Bur. 2004), citing *South Central Communications Corp.*, 18 FCC Rcd 700, 702-703 ¶ 9 (Enf. Bur. 2003); *Northeast Utilities*, 17 FCC Rcd 4115, 4117 ¶ 13 (Enf. Bur. 2002).

<sup>10</sup>Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>11</sup> Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

<sup>12</sup>47 C.F.R. §§ 0.111, 0.311, 0.180(f)(4).

<sup>13</sup>47 C.F.R. § 1.80.

<sup>14</sup>47 U.S.C. § 504(a).

<sup>15</sup>47 U.S.C. § 1.1914.

**FEDERAL COMMUNICATIONS COMMISSION**

George R. Dillon  
Assistant Chief, Enforcement Bureau